

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF GROUND WATER)
PERMIT NO. G3-22345 ISSUED TO)
ROY FODE)

FRANK P. SHINN, JR.,)
Appellant,)

v.)

STATE OF WASHINGTON,)
DEPARTMENT OF ECOLOGY and)
ROY FODE,)

Respondents.)

PCHB No. 613

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

This matter, the appeal of a ground water permit issued by the State Department of Ecology (hereinafter "Department") to Roy Fode, came in a formal hearing before the Pollution Control Hearings Board (Walt Woodward, presiding officer, and on the last two days of the hearing, Chris Smith and W. A. Gissberg) on October 11 and 17 and November 7, 1974, in Spokane.

Appellant appeared through John M. Moberg; respondent Department

1 through Wick Dufford, assistant attorney general, and respondent Fode
2 through Lawrence L. Tracy. JoAnn Ames, Spokane court reporter, recorded
3 the proceedings.

4 Witnesses were sworn and testified. Exhibits were admitted. Counsel
5 submitted briefs.

6 From testimony heard and reviewed by transcript, exhibits examined
7 and briefs considered, the exceptions and reply thereto, the Pollution
8 Control Hearings Board makes these

9 FINDINGS OF FACT

10 I.

11 Under the geographical area involved in this matter there are
12 prehistoric layers of permeable basalt rock to a depth of at least
13 4,500 feet formed by successive lava flows. The layers form pockets in
14 which ground water aquifers have formed. In 1943, with the construction
15 of Grand Coulee Dam, the Columbia Basin Project was formed to develop an
16 irrigation system for agricultural development.

17 The Columbia Basin Project never has provided irrigation canal
18 water to the geographical area involved in this matter. The easternmost
19 canal of the project, the East Low Canal, lies to the west of the instant
20 geographical area.

21 II.

22 The instant geographical area historically was known as one where
23 dry land farming was practiced. But in the early 1960s, probably as a
24 result of commingling of irrigation water seepage from areas to the
25 west with natural water aquifers, the instant geographical area
26 experienced a rise in its water table.

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1 Farmers found it financially feasible to drill for water and, thus,
2 increase their crop yields by sprinkler irrigation. Respondent's
3 predecessor agency issued 150 ground water well permits for irrigation
4 and, by 1966, it was obvious, from a declining water table, that there
5 could be an overissue of water withdrawal permits.

6 III.

7 In response to the above-described situation, the Department
8 promulgated WAC 508-14-010 and -020 on May 15, 1967. These regulations
9 established certain management areas and interim rules under which
10 ground water applications would be banned, limited or granted pending a
11 study by the Department of the source, extent, depth, volume and flow of
12 the ground waters.

13 In 1968, pursuant to the above, the Department closed an area
14 (called the "Odessa Hold Area") of about 1,100 square miles lying east
15 of the East Low Canal and including the instant geographical area to the
16 granting of ground water withdrawals. The Department agreed to accept
17 applications on a priority time basis but announced it would not process
18 them until completion of the aforementioned study.

19 IV.

20 To provide a foundation for the Department's water management program,
21 detailed studies were initiated by it to investigate water measurement
22 techniques, reasonable pump lifts, and to develop a functional ground
23 water model.

24 One part of the study, calculated to measure the level of water in
25 the aquifer and hence the availability of water for appropriation,
6 resulted in the completion in 1971 (by the United States Geological Survey)

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1 of a mathematical model for the Odessa and other areas of the Columbia
2 Basin. The model enables a computer to produce ground water flow and
3 aquifer water level information when water is subtracted by pumping or
4 added by recharge. Its results have been field measured and its accuracy
5 verified for the Odessa Sub-Area related to the instant appeal as late as
6 January and February, 1973. The model was based on the accumulation of
7 water data over four years ending in 1970.

8 Another phase of its study, was directed at gathering information
9 relating to the restraints of RCW 90.44.070, and was undertaken by the
10 State of Washington Water Research Center, the results of which were
11 embodied in October, 1971 in respondents' Exhibit 20 entitled "Long-Run
12 Costs and Policy Implications of Adjusting to a Declining Water Supply in
13 Eastern Washington". The purpose of the study was to develop economic and
14 cost data in order that the Department could determine a "reasonable or
15 feasible pumping lift in case of pumping developments" (RCW 90.44.070).

16 As the result of the completion of such studies and based thereon
17 the Department adopted WAC 173-128 (establishing the Odessa Ground-Water
18 Management Sub-Area) on January 15, 1973 and WAC 173-130 (Odessa Ground-
19 Water Sub-Area Management Policy) on January 25, 1974, both of which
20 cover the geographical area of the instant appeal, and began to process
21 on a time priority basis, as filed, those ground water applications it
22 had been holding since 1968.

23 V.

24 The policy of the Department provides for a limited controlled rate
25 of decline of the water level in "Zone A", (which is the area of the
26 instant appeal) to a total amount of 30 feet in any three year period

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1 (WAC 173-130-060) and to prevent the water table from descending more than
2 300 feet beneath the altitude of the static water level, as measured in
3 1967. (WAC 173-130-070) In 1967 the depth of the static water level
4 was 400 feet. Thus, by the granting of additional water rights, and the
5 appropriation thereof, the water level (as that term is used in
6 WAC 173-130-030(4)) will ultimately be allowed by the Department to decline
7 to 700 feet below the earth's surface. Appellant is a prior water
8 appropriator and, as a result of the issuance of new permits to others,
9 will ultimately be required to expend substantial sums of money for well
10 and well appurtenance improvements and additional operating costs to
11 enable him to appropriate the amounts of water to which he has a prior
12 right. However, the Department's regulations prevent junior appropriators
13 (respondent) from withdrawing ground water levels below 700 feet. Based
14 upon respondent's Exhibit 20 and the testimony of Doctor Walter R. Butcher
15 we find that allowing the water table to decline to 700 feet, at the
16 maximum rate of controlled decline of 30 feet in three years will not
17 result in an unreasonable pumping lift for the appellant.

18 As new permits are issued under such state policy, the waters which
19 have been stored in the aquifers above 700 feet (sic) will be depleted
20 within 35 years, but waters will at all times seep into the subarea to
21 provide a sustained yield of water for the foreseeable future.

22 VI.

23 The cost study received by respondent's Exhibit 20 was based upon
24 price-market data of a five year time period ending in 1971. Since then
25 both the prices which the farmer pays and at which he sells his product
26 have increased. Since the prices at which a farmer sells his product

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1 have increased at a greater rate, the cost-study (respondents's exhibit 5)
2 is still valid and it constitutes the latest presently available
3 information on that subject.

4 VII.

5 Any new well which is developed and operating within three miles of
6 another existing well will have a drawdown effect on the water table of
7 the existing well and vice versa.

8 VIII.

9 Respondent Fode's application for two wells in Section 3, Township
10 19, Range 29, E.W.M., Grant County, was found by the Department to have
11 water available for a beneficial use and that it would not impair
12 existing rights or be detrimental to public welfare; the Department
13 approved Fode's Application No. G3-22345 on May 15, 1974. That
14 approval is the subject of this appeal.

15 IX.

16 Appellant contends the new wells of respondent will adversely affect
17 that of appellant by lowering the pumping level to an unreasonable level.

18 X.

19 Appellant, a well driller and irrigation system specialist with
20 26 years of experience in the Moses Lake area, owns 500 acres of farm
21 land serviced by three ground water wells. One of these wells, located
22 just east of the East Low Canal, was authorized by the Department in
23 1965 for a water appropriation of 1,150 gallons a minute. This well is
24 S2 on Exhibit A-1.

25 XI.

26 A well, marked V1 on Exhibit A-1, is 4,000 feet to the north of S2
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1 When S2 is pumping and V1 is activated to pump, the water production
2 from S2 drops. The reverse is also true.

3 XII.

4 Respondent Fode's proposed No. 2 well, also shown on Exhibit A-1,
5 is 3,300 feet from S2.

6 XIII.

7 The S2 well had a 75 horsepower pump when the well was established in
8 1965. It produced about 1,000 gallons a minute in 1966. The V1 well was
9 established in 1968. In 1968, due to a lessened water production, a 100
10 horsepower pump was installed in the S2 well at the 410 foot level.

11 XIV.

12 Because of what he contends is a declining water table due to the
13 authorization by the Department of too many wells, appellant has budgeted
14 \$20,000 for the installation in 1975 of a 150 horsepower pump in the S2
15 well at a depth of 500 feet. This, appellant believes, will return the
16 well from its present production of 1,000 gallons a minute to its
17 allowable maximum production of 1,150 gallons a minute.

18 XV.

19 Six wells lying south and southeast of S2 and the sites of respondent
20 Fode's two wells (01, 02, 03, M1, M2 and M3 on Exhibit A-1) were equipped
21 in April, 1974 with water production measuring devices and logs recorded
22 their 1974 season output. Their 1974 logs show a steadily declining
23 amount of water production from the start of the irrigation season in the
24 spring to the end of the season in the fall of the year.

25 XVI.

3 The amount of water withdrawal contemplated by the permits of
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1 respondent will be within the water table decline permitted by the
2 provisions of WAC 173-130. The cumulative effect of respondent's wells
3 will be to reduce the static water level of appellant's well.

4 XVII.

5 The only evidence of the economic reasonableness of the pumping lift
6 which will be generally required as a result of the implementation of
7 respondent's policy and regulations is contained in respondents'
8 Exhibit 20. However, as that exhibit relates, "what is 'feasible' or
9 'economic' or 'reasonable' to one water user may not apply at all in
10 another case." (page 102 of respondents' Exhibit 20)

11 Appellant failed to establish that the pumping lift, as to him,
12 would be unreasonable or not feasible.

13 XVIII.

14 Any Conclusion of Law hereinafter stated which is deemed to be a
15 Finding of Fact is adopted herewith as same.

16 From these Findings the Pollution Control Hearings Board comes
17 to these

18 CONCLUSIONS OF LAW

19 I.

20 Appellant does not question that the water permits issued to
21 respondent are for a beneficial use. Rather, appellant attacks the
22 issuance of permits to respondent on the ground that such appropriation
23 of water would impair existing rights or be detrimental to the public
24 welfare (see RCW 90.44.060 which governs ground water but adopts
25 provisions of 90.03.290 relating to surface waters).

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II.

It is true that appellant's rights, whatever they may be, precede those of respondent. Thus, the relevant question is whether appellant's existing certificated water rights will be impaired by the regulations of the Department, i.e., WAC 173-130, and the issuance of permits to respondent pursuant thereto, the effect of which will be to lower the pumping level of appellant's well.

We conclude that the existing rights of appellant will not be impaired.

III.

Neither respondent's permits nor WAC 173-130 violate RCW 90.44.070 which provides:

No permit shall be granted for the development or withdrawal of public ground waters beyond the capacity of the underground bed or formation in a given basin, district, or locality to yield such water within a reasonable or feasible pumping lift in case of pumping developments

We conclude that the Department's limited and controlled rate of water level decline, as expressed in its rule and regulation, provides generally for a reasonable or feasible pumping lift. We recognize that economics must be given weight in construing the meaning to be given to the statutory terms "reasonable", or "feasible." However, we have found as a fact in Finding of Fact XVII that appellant did not prove facts which, as to him, might have established economic unreasonableness. Even had he done so, we would nonetheless conclude that RCW 90.44.060 must be interpreted as a prohibition only when the pumping lift becomes unreasonable or not feasible as to "pumping developments" generally.

With the world-wide shortage of food and the specter of hunger

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1 becoming evermore acute, the public interest demands that underground
2 waters be utilized (and thus not wasted) in order to convert arid lands
3 into the production of food. That would result in a small step in the
4 fulfillment of Isaiah 35.1 *The desert shall rejoice and blossom as*
5 *the rose.*

6 Assuming but not concluding, that appellant has a property right in
7 the level of the water table, his remedy may be to seek damages against
8 the State of Washington.

9 IV.

10 The permits issued by respondent are consistent, and not in conflict,
11 with RCW 90.44.060, 90.44.070 and 90.44.130. Therefore the permits of
12 respondent should be upheld.

13 V.

14 Any Finding of Fact which should be deemed a Conclusion of Law is
15 hereby adopted as such.

16 Therefore, the Pollution Control Hearings Board issues this

17 ORDER

18 The action and findings of the Department and its issuance of the
19 permits to respondent are affirmed.

20 DONE at Lacey, Washington this 29th day of January, 1975.

21 POLLUTION CONTROL HEARINGS BOARD

22 Chris Smith
CHRIS SMITH, Chairman

23 W. A. Gissberg
W. A. GISSBERG, Member

24 Walt Woodward
WALT WOODWARD, Member

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